

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A VARIANCE PERMIT)
GRANTED TO DAVID MILLER BY THE)
CITY OF SEATTLE AND DENIED BY THE)
DEPARTMENT OF ECOLOGY)

DAVID MILLER and CITY OF SEATTLE,)

Appellants,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Respondent.)

SHB No. 78-9

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

This matter, the request for a review of a denial by the Department of Ecology of a variance granted by the City of Seattle, was brought before the Shorelines Hearings Board, Dave J. Mooney, Chairman, Chris Smith, Robert E. Beaty, Gerald D. Probst, and Rodney G. Proctor upon a stipulated, written record filed June 26, 1978.

Appellant David Miller represented himself; appellant City of Seattle was represented by Ross A. Radley, Assistant City Attorney;

respondent Department of Ecology was represented by Robert V. Jensen,
Assistant Attorney General.

Having read the testimony and examined the exhibits contained
within the stipulated written record filed by the parties, having
reviewed the City of Seattle's Hearing Memorandum, and being fully
advised, the Shorelines Hearings Board makes the following

FINDINGS OF FACT

I

Appellant and his wife, Mr. and Mrs. Miller, own a lot on the
southern shore of Lake Washington, in Seattle. The lot is typical of
those in the area in that it is about 50 feet wide and falls steeply
(45 degrees) from Rainier Avenue to the water's edge, a distance of
some 20 horizontal feet. The lot then continues underwater. The Miller
seek to build their home on that lot.

On January 5, 1978, appellant filed with the City of Seattle an
application for a substantial development permit with two variances
from the City of Seattle Shoreline Master Program.¹ The proposed
development consisted of the home which the Millers plan, described as
a single family residence, 33 feet wide by 30 feet deep by 36 feet high,
with accessory dock 9'x41', and a recreational pier 6'x22'. Part of
the house itself, and all of the dock and pier, would be constructed
over the water on pilings. Such construction is typical in the area,

1. The Shoreline Master Program of the City of Seattle was approved
by the Department of Ecology on June 30, 1976, amended March 11, 1977.
We hereby take official notice of that master program as filed in the
office of the Code Reviser of the State of Washington.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 and both adjacent lots presently have houses constructed partially over
2 the water, on piling, along with docks on piling, just as the appellant
3 proposes. The waterward edge of appellant's house and the end of
4 appellant's dock would not go beyond, respectively, a line connecting
5 the waterward edge of the adjacent houses and a similar line connecting
6 the ends of the adjacent docks.

7 On February 17, 1978, the City of Seattle held a public hearing on
8 the proposed variances. There was no opposition. Four nearby neighbors
9 signed a statement that they are not opposed to this development.
10 (Exhibit A-31.)

11 On March 8, 1978, upon the studied consideration of its Department
12 of Community Development, the City of Seattle granted the shoreline
13 permit which appellant applied for. That permit authorized variances
14 from two specific requirements of the Seattle Master Program:

15 1. Section 21A.72: ". . . new residential structures over
16 water are prohibited."

17 2. Section 21A.33 and Table 2-D-a: "Maximum height (of a
18 building) over water: 15 feet."

19 The permit thus granted by the City of Seattle was then submitted
20 to the State Department of Ecology pursuant to RCW 90.58.140(12):

21 Any permit for a variance or conditional use by local govern-
22 ment under approved master programs must be submitted to the
23 department for its approval or disapproval.

24 By letter dated April 6, 1978, the Department of Ecology denied
25 the variance pertaining to over-the-water construction:

26 The Department of Ecology has reviewed the above referenced
27 permit which would allow the varying of two shoreline
28 regulations. One regulation restricts the height of a
29 structure from the surface of the water and the other
30 regulation prohibits structures over water.

31 FINAL FINDINGS OF FACT,
32 CONCLUSIONS OF LAW AND ORDER

1 The Seattle Master Program states in Section 21A.72(A) "...
2 new residential uses over water are prohibited..." It is and
3 has been the position of the department that prohibitions
4 cannot be varied. Variances can be used for bulk, setback or
5 other physical restrictions, not for allowing a prohibited
6 use. The department hereby denies this variance.

7 The appellant appeals from this denial by respondent, Department
8 of Ecology.

9 II

10 In addressing variances from regulations established pursuant to
11 the Shoreline Management Act, RCW 90.58.100(5) provides:

12 Each master program shall contain provisions to allow for the
13 varying of the application of use regulations of the program,
14 including provisions for permits for conditional uses and
15 variances, to insure that strict implementation of a program
16 will not create unnecessary hardships or thwart the policy
17 enumerated in RCW 90.58.020. Any such varying shall be
18 allowed only if extraordinary circumstances are shown and the
19 public interest suffers no substantial detrimental effect.
20 The concept of this subsection shall be incorporated in the
21 rules adopted by the department relating to the establishment
22 of a permit system as provided in RCW 90.58.140(3).

23 The referenced RCW 90.58.140(3) provides:

24 Local government shall establish a program, consistent with
25 rules adopted by the department, for the administration and
26 enforcement of the permit system provided in this section.
27 . . .

28 The Department of Ecology regulation pertaining to variances
29 granted under the Shoreline Management Act, WAC 173-14-150, became
30 effective on August 26, 1976, and provides:

31 A variance deals with specific requirements of the master
32 program and its objective is to grant relief when there are
33 practical difficulties or unnecessary hardships in the way
34 of carrying out the strict letter of the master program. A
35 variance will be granted only after the applicant can
36 demonstrate in addition to satisfying the procedures set
37 forth in WAC 173-14-130 the following:

38 FINAL FINDINGS OF FACT,
39 CONCLUSIONS OF LAW AND ORDER

1 (1) That if he complies with the provisions of the master
2 program, he cannot make any reasonable use of his property.
3 The fact that he might make a greater profit by using his
4 property in a manner contrary to the intent of the program
5 is not a sufficient reason for a variance.

6 (2) That the hardship results from the application of the
7 requirements of the act and master programs, and not, for
8 example, from deed restrictions or the applicant's own
9 actions.

10 (3) That the variance granted will be in harmony with
11 the general purpose and intent of the master program.

12 (4) That the public welfare and interest will be
13 preserved; if more harm will be done to the area by granting
14 the variance than would be done to the applicant by denying
15 it, the variance will be denied.

16 The City of Seattle Master Program contains the following language as
17 to variances:

18 Section 21A.61 Shoreline Variances.

19 In specific cases the Director with approval of the Department
20 of Ecology may authorize variances from specific requirements
21 of this Article when there are practical difficulties or
22 unnecessary hardships in the way of carrying out the strict
23 letter of the shoreline master program. A shoreline variance
24 will be granted only after the applicant can demonstrate the
25 following:

26 (a) That if he complies with the provisions of
27 the master program, he cannot make any reasonable
28 use of his property. The fact that he might make
29 a greater profit by using his property in a manner
30 contrary to the intent of the program is not a
31 sufficient reason for a variance.

32 (b) That the hardship results from the application
33 of the requirements of the Act and shoreline
34 master programs, and not, for example, from deed
35 restrictions or the applicant's own actions.

36 (c) That the variance granted will be in harmony
37 with the general purpose and intent of the
38 shoreline master program.

39 (d) That the public welfare and interest will be
40 preserved.

41 In authorizing a shoreline variance, the Director may attach
42 thereto such conditions regarding the location, character or

43 FINAL FINDINGS OF FACT,
44 CONCLUSIONS OF LAW AND ORDER

1 other features of a proposed structure or use as may be
2 deemed necessary to carry out the spirit and purpose of this
Article and in the public interest.

3 III

4 On prior occasions, the Department of Ecology has approved
5 variances allowing uses that were otherwise prohibited on shorelines
6 within the City of Seattle. The variance application of Hankmeier,
7 Burnett and Strauss, Seattle file No. SMA 77-24, is of particular
8 importance. There, the Department approved a variance for over-the-
9 water construction of three new residential structures, under the same
10 Seattle Master Program and Department of Ecology variance rule,
11 WAC 173-14-150, as are now applicable to this matter.

12 IV

13 Any Conclusion of Law which should be deemed a Finding of Fact
14 is hereby adopted as such.

15 From these Findings, the Shorelines Hearings Board comes to these

16 CONCLUSIONS OF LAW

17 I

18 Only one issue is presented by the Department of Ecology's denial
19 of appellant's request for variance. That is: Whether a variance
20 from a shoreline master program may authorize a prohibited use ("use
21 variance") or whether a variance may only authorize a deviation from
22 bulk, setback or other physical restrictions on the construction and
23 placement of structures ("area variance").

24 II

25 The legal standards which will resolve this issue are (1) the
26 variance provision of the Shoreline Management Act, RCW 90.58.100(5);

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

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1 (2) the Department of Ecology variance regulation, WAC 173-14-150, and
2 (3) the Seattle Master Program variance provision, Section 21A.61.
3 (The text of each is in Finding of Fact II.)

4 The statute itself, RCW 90.58.100(5) does not expressly provide for
5 nor prohibit use variances, as contrasted with area variances. Rather,
6 it includes the unadorned word "variances." By the same statutory
7 section, however, the Legislature accorded to local government and to
8 the Department of Ecology, the duty of establishing a variance program,
9 by rulemaking:

10 Each master program [of local government] shall contain
11 provisions . . . for permits for . . . variances . . . The
12 concept of this subsection shall be incorporated in the rules
adopted by the department [of Ecology] relating to the
establishment of a permit system . . . [Brackets added.]

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13 In their exercise of rulemaking power, both the Department of
14 Ecology and the City of Seattle have set down rules which authorize use
15 variances and which thus contradict the position taken by the Department
16 of Ecology in this matter. The Department's variance regulation,
17 WAC 173-14-150, states:

18 A variance deals with specific requirements of the master
19 program and its objective is to grant relief when there are
practical difficulties or unnecessary hardships in the way of
20 carrying out the strict letter of the master program. . . .
(Emphasis added.)

21 The wording of Section 21A.61 of the Seattle Master Program is identical
22 in substance. (See Finding of Fact II.) There is nothing in this
23 standard which prompts an inquiry as to whether the "specific require-
24 ment" of the master program deals with "use" or "area," much less
25 anything ruling out a variance should the specific requirement pertain

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

1 to "use" rather than "area."² On the contrary, there is further wording
2 in the Department's variance provision, echoed in the Seattle Master
3 Program, which militates against the position that those rules exclude
4 use variances. One of the mandatory tests for obtaining a variance is
5 that the applicant must show:

6 (1) That if he complies with the provisions of the
7 master program, he cannot make any reasonable use of his
property.

8 In Kooley and Pierce County v. Department of Ecology, SHB No. 218
9 (1976), we had occasion to examine this test in the light of customary
10 zoning principles as set out in the treatises. There we concluded that the
11 above test is an expression of the "unnecessary hardship" standard
12 customarily applied by courts in cases of use variances, while area
13 variances customarily entail a different standard. This choice of
14 standards buttresses our conclusion that a "specific requirement" of
15 a shoreline master program which prohibits a use can be the proper
16 subject of a variance. Under the facts and circumstances of this case,
17 the Department of Ecology's denial of the variance was erroneous and
18 should be reversed.

19 While the merits of the height variance granted to appellant,
20 Miller, by the City of Seattle are not at issue, we observe that the

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22 2. By contrast see Proposed Amendment to WAC 173-14-150 (Draft of
23 January 24, 1978) adopted by the Department of Ecology on June 13, 1978,
subsequent to the facts of this case. That proposal deletes the entire
present variance regulation and substitutes wording which begins:

24 The purpose of a variance permit is to grant relief to
25 specific bulk or dimensional requirements set forth in the
26 master program. . . .

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 building height appears to be compatible with the surrounding homes.

2 III

3 Any Finding of Fact which should be deemed a Conclusion of Law
4 is hereby adopted as such.

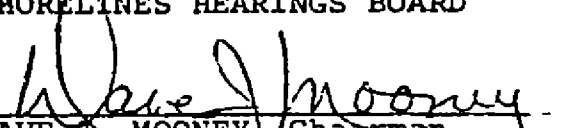
5 From these Conclusions, the Board enters this

6 ORDER

7 The action of the Department of Ecology denying the variance
8 granted by the City of Seattle to David Miller is hereby reversed.

9 DATED this 19th day of July, 1978.

10 SHORELINES HEARINGS BOARD

11 
12 DAVE J. MOONEY, Chairman

13 
14 CHRIS SMITH, Member

15 
16 ROBERT E. BEATTY, Member

17 
18 RODNEY G. PROCTOR, Member

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20 GERALD D. PROBST, Member

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27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER